

**Introduced by Senator Alquist**

February 18, 2005

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An act to amend ~~Section 311~~ of Sections 311, 311.1, 311.2, 311.3, 311.4, 311.5, 311.7, 311.8, 311.10, 311.11, and 312.1 of, and to repeal Section 311.9 of, the Penal Code, relating to obscene matter.

LEGISLATIVE COUNSEL'S DIGEST

SB 478, as amended, Alquist. Obscene matter: definition.

Existing law provides for the definition of "obscene matter," which is matter, taken as a whole, that to the average person applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts, or describes sexual conduct in a patently offensive way, and that taken as a whole, lacks serious literary, artistic, political, or scientific value. Further, existing law provides other considerations that are to be weighed in determining whether materials are "obscene matter" and defines various other terms that determine whether the law has been violated when "obscene matter" is viewed, distributed, ~~engaged in~~ sold, or exhibited.

~~This bill would make a technical, nonsubstantive change to this provision.~~

*Existing law also provides the punishment for violation of, and defenses to prosecution under, these provisions.*

*This bill would add various forms of pictorial reproductions, such as photocopy, videotape, computer generated images, and CD-ROMs, to the definition of "matter," to be used throughout the chapter on obscene material, and would remove the separate definition from each individual code section. This bill would also define other terms and exceptions, to be used throughout the chapter on obscene matter, and*

*remove the separate terms and exceptions from each individual code section. Further this bill would remove defenses, as specified from individual code sections and place them in one provision. This bill would repeal the provision that spells out punishment for certain violations, as specified, and would place the punishment for each offense in the appropriate code section itself.*

*Existing law makes it a misdemeanor to knowingly send or bring into this state for sale or distribution, or possess, publish, duplicate or print with the intent to distribute or exchange with a person 18 years of age old or older, or possess or control matter that depicts a person under 18 years of age engaging in or simulating sexual conduct.*

*This bill would make those violations, with matter depicting a person under 14 years of age engaging in or simulating sexual conduct, a misdemeanor or a felony.*

*Additionally, this bill would, upon 2nd or subsequent violation of certain offenses in the chapter on obscene material, under certain circumstances, make the offense a felony, or impose additional fines and days in a county jail.*

*Existing law does not require the prosecution or defense, in a prosecution under this chapter, to introduce expert testimony regarding the obscene or harmful nature of the matter which is the subject of the prosecution. Existing law also makes any evidence which tends to establish the “community standard,” or which bears upon the “value,” of the matter as defined, admissible when offered by either the prosecution or defense.*

*This bill would provide that neither the prosecution nor the defense is required to introduce expert testimony to establish the age of the person or that the person depicted, which is the subject of the prosecution, is a real or actual person. Further, this bill would provide that the proof that a person under 18 years of age was not completely generated by technology, may be established by direct and circumstantial evidence.*

*The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.*

*This bill would provide that no reimbursement is required by this act for a specified reason.*

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.  
State-mandated local program: ~~no~~-yes.

*The people of the State of California do enact as follows:*

SECTION 1. Section 311 of the Penal Code is amended to read:

311. As used in this chapter, the following definitions will apply:

(a) “Obscene matter” means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) If it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, if circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, this evidence is probative with respect to the nature of the matter and may justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value.

(3) In determining whether the matter taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in ~~subdivision (d) of Section 311.4~~ *this chapter*, is a factor that may be considered in making that determination.

(b) “Matter” means any *representation of information, data, or image, including any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, film, filmstrip, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment, or any other computer-generated image, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription, or mechanical, chemical,*

1 or electrical reproduction, or any other article, equipment,  
2 machine, or material. “Matter” also means live or recorded  
3 telephone messages if transmitted, disseminated, or distributed as  
4 part of a commercial transaction.

5 (c) “Person” means any individual, partnership, firm,  
6 association, corporation, limited liability company, or other legal  
7 entity. *“Person under 18 years of age” includes any matter that*  
8 *contains or incorporates any part of a natural person under 18*  
9 *years of age, in any manner, to give the appearance that the*  
10 *person is engaging in or simulating sexual conduct.*

11 (d) “Distribute” means transfer possession of, whether with or  
12 without consideration.

13 (e) *“Commercial” embraces all phases of commercial activity,*  
14 *and need not be undertaken for, or motivated by, profit.*

15 (f) “Knowingly” means being aware of the character of the  
16 matter or live conduct.

17 ~~(f)~~

18 (g) “Exhibit” means show.

19 ~~(g)~~

20 (h) “Obscene live conduct” means any physical human body  
21 activity, whether performed or engaged in alone or with other  
22 persons, including but not limited to singing, speaking, dancing,  
23 acting, simulating, or pantomiming, taken as a whole, that to the  
24 average person, applying contemporary statewide standards,  
25 appeals to the prurient interest and is conduct that, taken as a  
26 whole, depicts or describes sexual conduct in a patently offensive  
27 way and that, taken as a whole, lacks serious literary, artistic,  
28 political, or scientific value.

29 (1) If it appears from the nature of the conduct or the  
30 circumstances of its production, presentation, or exhibition that it  
31 is designed for clearly defined deviant sexual groups, the appeal  
32 of the conduct shall be judged with reference to its intended  
33 recipient group.

34 (2) In prosecutions under this chapter, if circumstances of  
35 production, presentation, advertising, or exhibition indicate that  
36 live conduct is being commercially exploited by the defendant  
37 for the sake of its prurient appeal, that evidence is probative with  
38 respect to the nature of the conduct and may justify the  
39 conclusion that the conduct lacks serious literary, artistic,  
40 political, or scientific value.

(3) In determining whether the live conduct taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the live conduct depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (d) of Section 311.4 *this chapter*, is a factor that may be considered in making that determination.

~~(h)~~

(i) *“Sexual conduct” means any of the following, whether actual or simulated:*

(1) *Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or between humans and animals.*

(2) *Penetration of the vagina or rectum by any object.*

(3) *Masturbation for the purpose of sexual stimulation of the viewer.*

(4) *Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.*

(5) *Exhibition of the genitals or the pubic or rectal area, of any person for the purpose of sexual stimulation of the viewer.*

(6) *Defecation or urination for the purpose of sexual stimulation of the viewer.*

(7) *Any lewd or lascivious sexual act as defined in Section 288.*

(j) *“Simulated” means any act that gives the appearance of being sexual conduct.*

(k) The Legislature expresses its approval of the holding of *People v. Cantrell*, 7 Cal. App. 4th 523, that, for the purposes of this chapter, matter that “depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct” is limited to visual works that depict that conduct.

*SEC. 2. Section 311.1 of the Penal Code is amended to read:*

311.1. ~~(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or~~

1 ~~computer-generated equipment or any other computer-generated~~  
2 ~~image that contains or incorporates in any manner, any film or~~  
3 ~~filmstrip, with intent to distribute or to exhibit to, or to exchange~~  
4 ~~with, others, or who offers to distribute, distributes, or exhibits~~  
5 ~~to, or exchanges with, others, any obscene matter, knowing that~~  
6 ~~the matter depicts a person under the age of 18 years personally~~  
7 ~~engaging engaged in or personally simulating an act of sexual~~  
8 ~~conduct, as defined in Section 311.4, shall be punished either by~~  
9 ~~imprisonment in the county jail for up to one year, by a fine not~~  
10 ~~to exceed one thousand dollars (\$1,000), or by both the fine and~~  
11 ~~imprisonment, or by imprisonment in the state prison, by a fine~~  
12 ~~not to exceed ten thousand dollars (\$10,000), or by the fine and~~  
13 ~~imprisonment.~~

14 ~~(b) This section does not apply to the activities of law~~  
15 ~~enforcement and prosecuting agencies in the investigation and~~  
16 ~~prosecution of criminal offenses or to legitimate medical,~~  
17 ~~scientific, or educational activities, or to lawful conduct between~~  
18 ~~spouses.~~

19 ~~(c) This section does not apply to matter which depicts a child~~  
20 ~~under the age of 18, which child is legally emancipated,~~  
21 ~~including lawful conduct between spouses when one or both are~~  
22 ~~under the age of 18.~~

23 ~~(d) It does not constitute a violation of this section for a~~  
24 ~~telephone corporation, as defined by Section 234 of the Public~~  
25 ~~Utilities Code, to carry or transmit messages described in this~~  
26 ~~chapter or perform related activities in providing telephone~~  
27 ~~services.~~

28 *SEC. 3. Section 311.2 of the Penal Code is amended to read:*

29 311.2. (a) Every person who knowingly sends or causes to be  
30 sent, or brings or causes to be brought, into this state for sale or  
31 distribution, or in this state possesses, prepares, publishes,  
32 produces, or prints, with intent to distribute or to exhibit to  
33 others, or who offers to distribute, distributes, or exhibits to  
34 others, any obscene matter is for a first offense, guilty of a  
35 misdemeanor. If the person has previously been convicted of any  
36 violation of this section, the court may, in addition to the  
37 punishment authorized in ~~Section 311.9 subdivision (f)~~, impose a  
38 fine not exceeding fifty thousand dollars (\$50,000).

39 (b) Every person who knowingly sends or causes to be sent, or  
40 brings or causes to be brought, into this state for sale or

1 distribution, or in this state possesses, prepares, publishes,  
 2 produces, develops, duplicates, or prints ~~any representation of~~  
 3 ~~information, data, or image, including, but not limited to, any~~  
 4 ~~film, filmstrip, photograph, negative, slide, photocopy, videotape,~~  
 5 ~~video laser disc, computer hardware, computer software,~~  
 6 ~~computer floppy disc, data storage media, CD-ROM, or~~  
 7 ~~computer-generated equipment or any other computer-generated~~  
 8 ~~image that contains or incorporates in any manner, any film or~~  
 9 ~~filmstrip,~~ with intent to distribute or to exhibit to, or to exchange  
 10 with, others for commercial consideration, or who offers to  
 11 distribute, distributes, or exhibits to, or exchanges with, others  
 12 for commercial consideration, any obscene matter, knowing that  
 13 the matter depicts a person under the age of 18 years ~~personally~~  
 14 ~~engaging engaged in or personally simulating an act of~~ sexual  
 15 ~~conduct, as defined in Section 311.4,~~ is guilty of a felony and  
 16 shall be punished by imprisonment in the state prison for two,  
 17 three, or six years, or by a fine not exceeding one hundred  
 18 thousand dollars (\$100,000), in the absence of a finding that the  
 19 defendant would be incapable of paying such a fine, or by both  
 20 that fine and imprisonment.

21 (c) Every person who knowingly sends or causes to be sent, or  
 22 brings or causes to be brought, into this state for sale or  
 23 distribution, or in this state possesses, prepares, publishes,  
 24 produces, develops, duplicates, or prints ~~any representation of~~  
 25 ~~information, data, or image, including, but not limited to, any~~  
 26 ~~film, filmstrip, photograph, negative, slide, photocopy, videotape,~~  
 27 ~~video laser disc, computer hardware, computer software,~~  
 28 ~~computer floppy disc, data storage media, CD-ROM, or~~  
 29 ~~computer-generated equipment or any other computer-generated~~  
 30 ~~image that contains or incorporates in any manner, any film or~~  
 31 ~~filmstrip,~~ with intent to distribute or exhibit to, or to exchange  
 32 with, a person 18 years of age or older, or who offers to  
 33 distribute, distributes, or exhibits to, or exchanges with, a person  
 34 18 years of age or older any matter, knowing that the matter  
 35 depicts a person under the age of 18 years ~~personally engaging~~  
 36 ~~engaged in or personally simulating an act of~~ sexual conduct, ~~as~~  
 37 ~~defined in Section 311.4,~~ is guilty of a misdemeanor and shall be  
 38 punished by imprisonment in the county jail for up to one year,  
 39 or by a fine not exceeding two thousand dollars (\$2,000), or by  
 40 both that fine and imprisonment. It is not necessary to prove

1 commercial consideration or that the matter is obscene in order to  
2 establish a violation of this subdivision. If a person has been  
3 previously convicted of a violation of this subdivision, he or she  
4 is guilty of a felony.

5 (d) *Every person who violates subdivision (c), knowing that*  
6 *the matter depicts a person under 14 years of age engaged in an*  
7 *act of sexual conduct, shall be punished either by imprisonment*  
8 *in a county jail for up to one year, by a fine not to exceed two*  
9 *thousand dollars (\$2,000), or by both the fine and imprisonment,*  
10 *or by imprisonment in the state prison, by a fine not to exceed ten*  
11 *thousand dollars (\$10,000), or by the fine and imprisonment.*

12 (e) Every person who knowingly sends or causes to be sent, or  
13 brings or causes to be brought, into this state for sale or  
14 distribution, or in this state possesses, prepares, publishes,  
15 produces, develops, duplicates, or prints ~~any representation of~~  
16 ~~information, data, or image, including, but not limited to, any~~  
17 ~~film, filmstrip, photograph, negative, slide, photocopy, videotape,~~  
18 ~~video laser disc, computer hardware, computer software,~~  
19 ~~computer floppy disc, data storage media, CD-ROM, or~~  
20 ~~computer-generated equipment or any other computer-generated~~  
21 ~~image that contains or incorporates in any manner, any film or~~  
22 ~~filmstrip, with intent to distribute or exhibit to, or to exchange~~  
23 ~~with, a person under 18 years of age, or who offers to distribute,~~  
24 ~~distributes, or exhibits to, or exchanges with, a person under 18~~  
25 ~~years of age any matter, knowing that the matter depicts a person~~  
26 ~~under the age of 18 years personally engaging engaged in or~~  
27 ~~personally simulating an act of sexual conduct, as defined in~~  
28 ~~Section 311.4, is guilty of a felony. It is not necessary to prove~~  
29 ~~commercial consideration or that the matter is obscene in order to~~  
30 ~~establish a violation of this subdivision.~~

31 ~~(e) Subdivisions (a) to (d), inclusive, do not apply to the~~  
32 ~~activities of law enforcement and prosecuting agencies in the~~  
33 ~~investigation and prosecution of criminal offenses, to legitimate~~  
34 ~~medical, scientific, or educational activities, or to lawful conduct~~  
35 ~~between spouses.~~

36 ~~(f) This section does not apply to matter that depicts a legally~~  
37 ~~emancipated child under the age of 18 years or to lawful conduct~~  
38 ~~between spouses when one or both are under the age of 18 years.~~

39 ~~(g) It does not constitute a violation of this section for a~~  
40 ~~telephone corporation, as defined by Section 234 of the Public~~



~~Utilities Code, to carry or transmit messages described in this chapter or to perform related activities in providing telephone services.~~

*(f) In addition to any other punishment authorized by this section, every person who violates this section, except subdivision (b), is punishable by a fine of no more than one thousand dollars (\$1,000) plus five dollars (\$5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars (\$10,000), or by imprisonment in a county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in a county jail, or by both such fine and imprisonment. If the person has previously been convicted of any offense in this chapter, except subdivision (b) of Section 311.2, or of a violation of Section 313.1, he or she shall be punished by imprisonment in the state prison.*

SEC. 4. Section 311.3 of the Penal Code is amended to read:

311.3. (a) A person is guilty of sexual exploitation of a child if he or she knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip matter that depicts a person under the age of 18 years engaged in an act of sexual conduct.

(b) ~~As used in this section, "sexual conduct" means any of the following:~~

(1) ~~Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.~~

(2) ~~Penetration of the vagina or rectum by any object.~~

(3) ~~Masturbation for the purpose of sexual stimulation of the viewer.~~

(4) ~~Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.~~

1 ~~(5) Exhibition of the genitals or the pubic or rectal area of any~~  
2 ~~person for the purpose of sexual stimulation of the viewer.~~

3 ~~(6) Defecation or urination for the purpose of sexual~~  
4 ~~stimulation of the viewer.~~

5 ~~(e) Subdivision (a) does not apply to the activities of law~~  
6 ~~enforcement and prosecution agencies in the investigation and~~  
7 ~~prosecution of criminal offenses or to legitimate medical,~~  
8 ~~scientific, or educational activities, or to lawful conduct between~~  
9 ~~spouses.~~

10 ~~(d)~~

11 ~~(b) Every person who violates subdivision (a) shall be~~  
12 ~~punished by a fine of not more than two thousand dollars~~  
13 ~~(\$2,000) or by imprisonment in a county jail for not more than~~  
14 ~~one year, or by both that fine and imprisonment. If the person has~~  
15 ~~been previously convicted of a violation of subdivision (a) or any~~  
16 ~~section of this chapter, he or she shall be punished by~~  
17 ~~imprisonment in the state prison.~~

18 ~~(e) The provisions of this section do not apply to an employee~~  
19 ~~of a commercial film developer who is acting within the scope of~~  
20 ~~his or her employment and in accordance with the instructions of~~  
21 ~~his or her employer, provided that the employee has no financial~~  
22 ~~interest in the commercial developer by which he or she is~~  
23 ~~employed.~~

24 ~~(f) Subdivision (a) does not apply to matter that is unsolicited~~  
25 ~~and is received without knowledge or consent through a facility,~~  
26 ~~system, or network over which the person or entity has no~~  
27 ~~control.~~

28 *SEC. 5. Section 311.4 of the Penal Code is amended to read:*

29 311.4. (a) Every person who, with knowledge that a person is  
30 a minor, or who, while in possession of any facts on the basis of  
31 which he or she should reasonably know that the person is a  
32 minor, hires, employs, or uses the minor to do or assist in doing  
33 any of the acts described in Section 311.2, is, for a first offense,  
34 guilty of a misdemeanor. If the person has previously been  
35 convicted of any violation of this section, the court may, in  
36 addition to the punishment authorized in Section 311.9, impose a  
37 fine not exceeding fifty thousand dollars (\$50,000).

38 (b) Every person who, with knowledge that a person is a minor  
39 under the age of 18 years, or who, while in possession of any  
40 facts on the basis of which he or she should reasonably know that

1 the person is a minor under the age of 18 years, knowingly  
 2 promotes, employs, uses, persuades, induces, or coerces a minor  
 3 under the age of 18 years, or any parent or guardian of a minor  
 4 under the age of 18 years under his or her control who knowingly  
 5 permits the minor, to engage in or assist others to engage in  
 6 either posing or modeling alone or with others for purposes of  
 7 preparing ~~any representation of information, data, or image,~~  
 8 ~~including, but not limited to, any film, filmstrip, photograph,~~  
 9 ~~negative, slide, photocopy, videotape, video laser disc, computer~~  
 10 ~~hardware, computer software, computer floppy disc, data storage~~  
 11 ~~media, CD-ROM, or computer-generated equipment or any other~~  
 12 ~~computer-generated image that contains or incorporates in any~~  
 13 ~~manner, any film, filmstrip, matter, or a live performance~~  
 14 involving, sexual conduct by a minor under the age of 18 years  
 15 alone or with other persons or animals, for commercial purposes,  
 16 is guilty of a felony and shall be punished by imprisonment in the  
 17 state prison for three, six, or eight years.

18 (c) Every person who, with knowledge that a person is a minor  
 19 under the age of 18 years, or who, while in possession of any  
 20 facts on the basis of which he or she should reasonably know that  
 21 the person is a minor under the age of 18 years, knowingly  
 22 promotes, employs, uses, persuades, induces, or coerces a minor  
 23 under the age of 18 years, or any parent or guardian of a minor  
 24 under the age of 18 years under his or her control who knowingly  
 25 permits the minor, to engage in or assist others to engage in  
 26 either posing or modeling alone or with others for purposes of  
 27 preparing ~~any representation of information, data, or image,~~  
 28 ~~including, but not limited to, any film, filmstrip, photograph,~~  
 29 ~~negative, slide, photocopy, videotape, video laser disc, computer~~  
 30 ~~hardware, computer software, computer floppy disc, data storage~~  
 31 ~~media, CD-ROM, or computer-generated equipment or any other~~  
 32 ~~computer-generated image that contains or incorporates in any~~  
 33 ~~manner, any film, filmstrip matter, or a live performance~~  
 34 involving, sexual conduct by a minor under the age of 18 years  
 35 alone or with other persons or animals, is guilty of a felony. It is  
 36 not necessary to prove commercial purposes in order to establish  
 37 a violation of this subdivision.

38 (d) ~~(1) As used in subdivisions (b) and (c), “sexual conduct”~~  
 39 ~~means any of the following, whether actual or simulated: sexual~~  
 40 ~~intereourse, oral copulation, anal intercourse, anal oral~~

1 copulation, masturbation, bestiality, sexual sadism, sexual  
2 masochism, penetration of the vagina or rectum by any object in  
3 a lewd or lascivious manner, exhibition of the genitals or pubic  
4 or rectal area for the purpose of sexual stimulation of the viewer,  
5 any lewd or lascivious sexual act as defined in Section 288, or  
6 excretory functions performed in a lewd or lascivious manner,  
7 whether or not any of the above conduct is performed alone or  
8 between members of the same or opposite sex or between  
9 humans and animals. An act is simulated when it gives the  
10 appearance of being sexual conduct.

11 (2) As used in subdivisions (b) and (c), “matter” means any  
12 film, filmstrip, photograph, negative, slide, photocopy, videotape,  
13 video laser disc, computer hardware, computer software,  
14 computer floppy disc, or any other computer-related equipment  
15 or computer-generated image that contains or incorporates in any  
16 manner, any film, filmstrip, photograph, negative, slide,  
17 photocopy, videotape, or video laser disc.

18 (c) This section does not apply to a legally emancipated minor  
19 or to lawful conduct between spouses if one or both are under the  
20 age of 18.

21 (f)

22 (d) In every prosecution under this section involving a minor  
23 under the age of 14 years at the time of the offense, the age of the  
24 victim shall be pled and proven for the purpose of the enhanced  
25 penalty provided in Section 647.6. Failure to plead and prove that  
26 the victim was under the age of 14 years at the time of the  
27 offense is not a bar to prosecution under this section if it is  
28 proven that the victim was under the age of 18 years at the time  
29 of the offense.

30 (e) Every person who violates this section is punishable by a  
31 fine of not more than two thousand dollars (\$2,000) or by  
32 imprisonment in a county jail for not more than one year, or by  
33 both a fine and imprisonment. If a person has been previously  
34 convicted of a violation of Section 311.3 or 311.4, he or she shall  
35 be punished by imprisonment in the state prison.

36 SEC. 6. Section 311.5 of the Penal Code is amended to read:

37 311.5. (a) Every person who writes, creates, or solicits the  
38 publication or distribution of advertising or other promotional  
39 material, or who in any manner promotes, the sale, distribution,

1 or exhibition of matter represented or held out by him to be  
2 obscene, is guilty of a misdemeanor.

3 *(b) In addition to the punishment authorized in (a), every*  
4 *person who violates this section is punishable by a fine of not*  
5 *more than one thousand dollars (\$1,000) plus five dollars (\$5)*  
6 *for each additional unit of material coming within the provisions*  
7 *of this chapter, which is involved in the offense, not to exceed ten*  
8 *thousand dollars (\$10,000), or by imprisonment in a county jail*  
9 *for not more than six months plus one day for each additional*  
10 *unit of material coming within the provisions of this chapter, and*  
11 *which is involved in the offense, the basic maximum and*  
12 *additional days not to exceed 360 days in a county jail, or by*  
13 *both a fine and imprisonment. If the person has previously been*  
14 *convicted of any offense in this chapter, except subdivision (b) of*  
15 *Section 311.2, or of a violation of Section 313.1, he or she shall*  
16 *be punished by imprisonment in the state prison.*

17 SEC. 7. Section 311.7 of the Penal Code is amended to read:

18 311.7. (a) Every person who, knowingly, as a condition to a  
19 sale, allocation, consignment, or delivery for resale of any paper,  
20 magazine, book, periodical, publication or other merchandise,  
21 requires that the purchaser or consignee receive any obscene  
22 matter or who denies or threatens to deny a franchise, revokes or  
23 threatens to revoke, or imposes any penalty, financial or  
24 otherwise, by reason of the failure of any person to accept  
25 obscene matter, or by reason of the return of such obscene  
26 matter, is guilty of a misdemeanor.

27 *(b) Every person who violates this section is punishable by*  
28 *fine of not more than one thousand dollars (\$1,000) or by*  
29 *imprisonment in a county jail for not more than six months, or by*  
30 *both a fine and imprisonment. For a second or subsequent*  
31 *offense he or she shall be punished by a fine of not more than two*  
32 *thousand dollars (\$2,000), or by imprisonment in a county jail*  
33 *for not more than one year, or by both a fine and imprisonment.*  
34 *If the person has twice been convicted of a violation of this*  
35 *chapter, subsequent violation of this section shall be punishable*  
36 *as a felony.*

37 SEC. 8. Section 311.8 of the Penal Code is amended to read:

38 311.8. (a) It shall be a defense in any prosecution for a  
39 violation of this chapter that the act charged was committed in  
40 aid of legitimate *medical, scientific, or educational*—~~purposes~~

1 activities, or during lawful conduct between spouses when one or  
2 both are under 18 years of age, or that the matter depicts a child  
3 under 18 years of age, which child is legally emancipated.

4 (b) This chapter does not apply to the activities of law  
5 enforcement and prosecuting agencies in the investigation and  
6 prosecution of criminal offenses.

7 (c) The provisions of this chapter do not apply to an employee  
8 of a commercial film developer who is acting within the scope of  
9 his or her employment and in accordance with the instructions of  
10 his or her employer, provided that the employee has no financial  
11 interest in the commercial developer by which he or she is  
12 employed.

13 (d) This chapter does not apply to matter that is unsolicited  
14 and is received without knowledge or consent through a facility,  
15 system, or network over which the person or entity has no  
16 control.

17 (e) It does not constitute a violation of this chapter for a  
18 telephone corporation, as defined by Section 234 of the Public  
19 Utilities Code, to carry or transmit messages described in this  
20 chapter or perform related activities in providing telephone  
21 services.

22 (f) It shall be a defense in any prosecution for a violation of  
23 this chapter by a person who knowingly distributed any obscene  
24 matter by the use of telephones or telephone facilities to any  
25 person under the age of 18 years that the defendant has taken  
26 either of the following measures to restrict access to the obscene  
27 matter by persons under 18 years of age:

28 (1) Required the person receiving the obscene matter to use an  
29 authorized access or identification code, as provided by the  
30 information provider, before transmission of the obscene matter  
31 begins, where the defendant has previously issued the code by  
32 mailing it to the applicant therefor after taking reasonable  
33 measures to ascertain that the applicant was 18 years of age or  
34 older and has established a procedure to immediately cancel the  
35 code of any person after receiving notice, in writing or by  
36 telephone, that the code has been lost, stolen, or used by persons  
37 under the age of 18 years or that the code is no longer desired.

38 (2) Required payment by credit card before transmission of the  
39 matter.

40 ~~(e)–~~

1 (g) Any list of applicants or recipients compiled or maintained  
2 by an information-access service provider for purposes of  
3 compliance with subdivision (b) (f) is confidential and shall not  
4 be sold or otherwise disseminated except upon order of the court.

5 *SEC. 9. Section 311.9 of the Penal Code is repealed.*

6 ~~311.9. (a) Every person who violates Section 311.2 or 311.5,~~  
7 ~~except subdivision (b) of Section 311.2, is punishable by fine of~~  
8 ~~not more than one thousand dollars (\$1,000) plus five dollars~~  
9 ~~(\$5) for each additional unit of material coming within the~~  
10 ~~provisions of this chapter, which is involved in the offense, not to~~  
11 ~~exceed ten thousand dollars (\$10,000), or by imprisonment in the~~  
12 ~~county jail for not more than six months plus one day for each~~  
13 ~~additional unit of material coming within the provisions of this~~  
14 ~~chapter, and which is involved in the offense, such basic~~  
15 ~~maximum and additional days not to exceed 360 days in the~~  
16 ~~county jail, or by both such fine and imprisonment. If such~~  
17 ~~person has previously been convicted of any offense in this~~  
18 ~~chapter, or of a violation of Section 313.1, a violation of Section~~  
19 ~~311.2 or 311.5, except subdivision (b) of Section 311.2, is~~  
20 ~~punishable as a felony.~~

21 ~~(b) Every person who violates Section 311.4 is punishable by~~  
22 ~~fine of not more than two thousand dollars (\$2,000) or by~~  
23 ~~imprisonment in the county jail for not more than one year, or by~~  
24 ~~both such fine and such imprisonment. If such person has been~~  
25 ~~previously convicted of a violation of former Section 311.3 or~~  
26 ~~Section 311.4 he is punishable by imprisonment in the state~~  
27 ~~prison.~~

28 ~~(c) Every person who violates Section 311.7 is punishable by~~  
29 ~~fine of not more than one thousand dollars (\$1,000) or by~~  
30 ~~imprisonment in the county jail for not more than six months, or~~  
31 ~~by both such fine and imprisonment. For a second and~~  
32 ~~subsequent offense he shall be punished by a fine of not more~~  
33 ~~than two thousand dollars (\$2,000), or by imprisonment in the~~  
34 ~~county jail for not more than one year, or by both such fine and~~  
35 ~~imprisonment. If such person has been twice convicted of a~~  
36 ~~violation of this chapter, a violation of Section 311.7 is~~  
37 ~~punishable as a felony.~~

38 *SEC. 10. Section 311.10 of the Penal Code is amended to*  
39 *read:*

1 311.10. ~~(a)~~ Any person who advertises for sale or  
2 distribution any obscene matter knowing that it depicts a person  
3 under the age of 18 years ~~personally engaging engaged in or~~  
4 ~~personally simulating an act of~~ sexual conduct, ~~as defined~~  
5 ~~in Section 311.4~~, is guilty of a felony and is punishable by  
6 imprisonment in the state prison for two, three, or four years, or  
7 in a county jail not exceeding one year, or by a fine not  
8 exceeding fifty thousand dollars (\$50,000), or by both such fine  
9 and imprisonment.

10 ~~(b) Subdivision (a) shall not apply to the activities of law~~  
11 ~~enforcement and prosecution agencies in the investigation and~~  
12 ~~prosecution of criminal offenses.~~

13 *SEC. 11. Section 311.11 of the Penal Code is amended to*  
14 *read:*

15 311.11. (a) Every person who knowingly possesses or  
16 controls any matter, ~~representation of information, data, or~~  
17 ~~image, including, but not limited to, any film, filmstrip,~~  
18 ~~photograph, negative, slide, photocopy, videotape, video laser~~  
19 ~~disc, computer hardware, computer software, computer floppy~~  
20 ~~disc, data storage media, CD-ROM, or computer-generated~~  
21 ~~equipment or any other computer-generated image that contains~~  
22 ~~or incorporates in any manner, any film or filmstrip, the~~  
23 ~~production of which involves the use of a person under the age of~~  
24 ~~18 years~~, knowing that the matter depicts a person under the age  
25 of 18 years personally engaging in or simulating sexual conduct,  
26 ~~as defined in subdivision (d) of Section 311.4~~, is guilty of a  
27 public offense and shall be punished by imprisonment in the  
28 county jail for up to one year, or by a fine not exceeding two  
29 thousand five hundred dollars (\$2,500), or by both the fine and  
30 imprisonment.

31 *(b) Every person who violates subdivision (a) knowing that the*  
32 *matter depicts a person under 14 years of age engaged in an act*  
33 *of sexual conduct, shall be punished either by imprisonment in a*  
34 *county jail for up to one year, by a fine not to exceed two*  
35 *thousand dollars (\$2,000), or by both the fine and imprisonment,*  
36 *or by imprisonment in the state prison, by a fine not to exceed ten*  
37 *thousand dollars (\$10,000), or by both the fine and*  
38 *imprisonment.*

39 *(c) If a person has been previously convicted of a violation of*  
40 *this section, or of a violation of subdivision (b) or (d) of Section*



1 311.2, or *a violation of subdivision (b) or (c) of Section 311.4,*  
2 *or a violation of any offense listed in paragraph (1) of*  
3 *subdivision (a) of Section 290.4, or any person classified as a*  
4 *Sexually Violent Predator*, he or she is guilty of a felony and  
5 shall be punished by imprisonment for two, four, or six years.

6 ~~(e)–~~

7 *(d) It is not necessary to prove that the matter is obscene in*  
8 *order to establish a violation of this section.*

9 ~~(d)–~~

10 *(e) This section does not apply to drawings, figurines, statues,*  
11 *or any film rated by the Motion Picture Association of America,*  
12 *nor does it apply to live or recorded telephone messages when*  
13 *transmitted, disseminated, or distributed as part of a commercial*  
14 *transaction.*

15 *SEC. 12. Section 312.1 of the Penal Code is amended to*  
16 *read:*

17 312.1. *(a) In any prosecution for a violation of the provisions*  
18 *of this chapter or of Chapter 7.6 (commencing with Section 313),*  
19 *neither the prosecution nor the defense shall be required to*  
20 *introduce expert witness testimony concerning the obscene or*  
21 *harmful character of the matter or live conduct which is the*  
22 *subject of the prosecution.* ~~Any~~

23 *(b) Any evidence which tends to establish contemporary*  
24 *community standards of appeal to prurient interest or of*  
25 *customary limits of candor in the description or representation of*  
26 *nudity, sex, or excretion, or which bears upon the question of*  
27 *significant literary, artistic, political, educational, or scientific*  
28 *value shall, subject to the provisions of the Evidence Code, be*  
29 *admissible when offered by either the prosecution or by the*  
30 *defense.*

31 *(c) In any prosecution for a violation of the provisions of this*  
32 *chapter, neither the prosecution nor the defense shall be required*  
33 *to introduce expert witness testimony to establish the age of a*  
34 *person depicted in a matter which is the subject of the*  
35 *prosecution. Age may be established by both direct and*  
36 *circumstantial evidence.*

37 *(d) In any prosecution for a violation of the provisions of this*  
38 *chapter, neither the prosecution nor the defense shall be required*  
39 *to introduce expert witness testimony to establish that the person*  
40 *depicted in a matter is a real or actual person. The proof that a*

1 *person under 18 years of age was not completely generated by*  
2 *the use of technology, may be established by both direct and*  
3 *circumstantial evidence.*

4 *SEC. 13. No reimbursement is required by this act pursuant*  
5 *to Section 6 of Article XIII B of the California Constitution*  
6 *because the only costs that may be incurred by a local agency or*  
7 *school district will be incurred because this act creates a new*  
8 *crime or infraction, eliminates a crime or infraction, or changes*  
9 *the penalty for a crime or infraction, within the meaning of*  
10 *Section 17556 of the Government Code, or changes the definition*  
11 *of a crime within the meaning of Section 6 of Article XIII B of the*  
12 *California Constitution.*